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# COMPROMISING THE HEARSAY RULE: THE FALLACY OF RES GESTAE RELIABILITY

James Donald Moorehead\*

## I. INTRODUCTION

Would you entrust your life to the judgment or perception of a person who is acting under extreme stress or trauma? Do you trust your *own* ability to reason and think clearly under duress? Do you believe that a descriptive statement made at the precise moment of observation is always reliable? Affirmative answers to these questions lie at the heart of the *res gestae* exceptions to the hearsay rule.<sup>1</sup> This Article argues that the answer to each question should be “No” and, therefore, that the *res gestae* exceptions should be abolished. By nature, this argument is controversial because it directly contravenes the trend in judicial decisionmaking, generally supported by modern evidence scholarship, to admit more, not less, hearsay.<sup>2</sup>

Historically, judges and legal scholars justified the courtroom admission of *res gestae*<sup>3</sup> hearsay on the theory that exclamations

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1. At common law the *res gestae* exceptions included statements, utterances, and exclamations that surrounded the perceived event. *See, e.g.*, 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1768 (Chadbourn Rev. 1976) [hereinafter WIGMORE/CHADBOURN].

2. *See generally* Faust F. Rossi, *The Silent Revolution*, 9 LITIG. 13, 13-17 (1983) (discussing the recent development of theories and precedent allowing the admission of almost all probative hearsay). Professor Rossi comments that “the ban on hearsay is now almost a fiction.” *Id.* at 13. The driving force behind this judicial and academic trend appears to be a widely held belief, discussed in part II.A.3, that jurors are capable of understanding hearsay and the unique problems associated with its admission.

3. The term *res gestae*, as used in this Article, refers to those exceptions found in Federal Rules of Evidence 803(1), (2), and (3), along with other state rules that essentially mimic the Federal Rules. *See infra* part II.C.

*Res gestae* means, literally, things or things happened. Therefore, to be admissible as an exception to the hearsay rule, words spoken, thoughts expressed, and gestures made, must all be so closely connected to the occurrence

spontaneously uttered during the excitement of a stressful event, or statements contemporaneously describing a non-stressful event, are made without forethought and therefore are likely to be trustworthy.<sup>4</sup> According to proponents of the exception, either stress, or the close association between statement and event, provides a measure of reliability and diminishes the possibility of reflective thought and fabrication.<sup>5</sup> Thus, judges often admitted *res gestae* statements in spite of the fact that they were hearsay.<sup>6</sup> As this Article will

or event in both time and substance as to be a part of the happening.

McCandless v. Inland N.W. Film Serv., Inc., 392 P.2d 613, 618 (Wash. 1964).

This Article uses the term *res gestae* because of its historical reference, and because the modern exceptions to the hearsay rule that are based on *res gestae* principles are still supported solely by their historical justifications.

The term *res gestae* has been criticized by many, including Wigmore, because of its imprecise meaning. 6 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1767 (3d ed. 1940) [hereinafter WIGMORE]. Wigmore believed that the term "ought therefore wholly to be repudiated, as a vicious element in our legal phraseology." *Id.* Edmund Morgan also showed disdain for the term:

The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as "*res gestae*." It is probable that this troublesome expression owes its existence and persistence in our law of evidence to an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking.

Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 229 (1922).

In a recent article one commentator noted the continued use of the phrase by today's judges. David Schlueter, *Res Gestae Revisited*, 56 TEX. B. J. 667, 667 (1993) ("[T]he court simply stated '[w]e hold the trial court properly found the evidence was part of the *res gestae* and was not hearsay.' " (quoting *Rhodes v. Batilla*, 848 S.W.2d 833, 847 (Tex. Ct. App. 1993))).

4. See generally WIGMORE/CHADBURN, *supra* note 1, §§ 1747, 1749 (citing various authority justifying the admission of *res gestae* hearsay on this theory).

5. *Id.* § 1747, at 195.

6. Use of the term *res gestae* to identify exceptions to the hearsay rule should be distinguished from the use of the term to connote the admission of nontestimonial evidence closely associated with an event. See *People v. Sceravino*, 598 N.Y.S.2d 296, 297 (App. Div. 1993); *Preston v. Commonwealth*, 406 S.W.2d 398, 400-01 (Ky. Ct. App. 1966). For instance, in *Sceravino*, the court concluded that "the evidence of both the uncharged assaults and the additional rapes and sodomies was properly admitted as part of the *res gestae*." *Sceravino*, 598 N.Y.S.2d at 297; see also *Preston*, 406 S.W.2d at 400-01 (citation omitted):

[C]ourts in general have reduced the term "*res gestae*" to a useless and misleading shibboleth by embracing within it two separate and distinct categories of verbal statements . . . . When the utterance of certain words constitutes or is part of the details of an act, occurrence or transaction which in itself is relevant and provable, the utterance may be proved as a verbal act, just as may be a visual observation of an event. This is not hearsay evidence; it is not admitted

examine, the early nineteenth century beliefs about the nature of res gestae statements have not withstood the test of time or the scrutiny of modern commentators. Yet the practice of admitting such evidence continues under the same reasoning.

The hearsay rule excludes evidence because of a justifiable concern over erroneous judgments and their impact. On their face, the principles governing the admission of hearsay at trial are straightforward. The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."<sup>7</sup> In everyday conversation, we might refer to hearsay as "second hand information." In theory, the rule operates under a simple premise: Hearsay is not admissible because it is unreliable, and therefore, more prejudicial than probative.<sup>8</sup> But because the elimination of hearsay means withholding information from the trier of fact, exceptions to the rule have developed.<sup>9</sup> The hearsay rule and its exceptions exist in order to add a measure of reliability to adjudicative decisionmaking.<sup>10</sup> Therefore, the question concerning each categorical exception must be, does this exception ensure some degree of confidence in the hearsay statement?

The exceptions once commonly known as res gestae comprise a significant part of the modern hearsay framework. Today, these exceptions are generally codified in Federal Rules of Evidence 803(1), Present Sense Impression;<sup>11</sup> 803(2), Excited Utterance;<sup>12</sup> and 803(3), Then Existing Mental, Emotional, or Physical Condition or State of Mind.<sup>13</sup> Furthermore, most states have a codified version of the res gestae exceptions, often derived in part from the Federal Rules.<sup>14</sup> Courts apply the exceptions in both civil and criminal trials. But the

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for the purpose of proving the truth of what was said, but for the purpose of describing the relevant details of what took place.

7. FED. R. EVID. 801(c).

8. See, e.g., 5 WIGMORE/CHADBOURN, *supra* note 1, §§ 1362-1363.

9. *Id.* § 1420.

10. *Id.*

11. FED. R. EVID. 803(1).

12. FED. R. EVID. 803(2).

13. FED. R. EVID. 803(3).

14. All 50 states recognize some form of exceptions to the hearsay exclusion, based on excitement, contemporaneity, or both. DAVID F. BINDER, *HEARSAY HANDBOOK* 144 (3d ed. 1991) (citing the corresponding statutes from all 50 states). For a discussion of how one state's hearsay schema was derived from the Federal Rules, see Alfred H. Knight, III, *The Federal Influence on the Tennessee Hearsay Rule*, 57 TENN. L. REV. 117 (1989).

magnitude of the problem is perhaps best observed in the willingness of courts to rely on these questionable exceptions in individual criminal convictions. For instance, in the twenty-four-month period between April 30, 1993 and May 1, 1995, the United States Courts of Appeals published eighteen opinions reviewing criminal appeals in which one of the three federal res gestae exceptions was either used in the prosecution's conviction of the defendant, denied use when offered by the defense, or relied upon by the state in an attempt to overturn the district court's grant of habeas corpus.<sup>15</sup> In fifteen of these appeals, or eighty-three percent, the state prevailed.<sup>16</sup> During the same period, the appellate courts of New York heard twelve criminal appeals concerning similar evidentiary rulings and affirmed eleven of these twelve convictions.<sup>17</sup> This Article argues that the res

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15. *United States v. Rivera*, 43 F.3d 1291, 1296 (9th Cir. 1995); *United States v. Brewer*, 36 F.3d 266, 271-72 (2d Cir. 1994); *United States v. Sowa*, 34 F.3d 447, 452-53 (7th Cir. 1994); *United States v. Winters*, 33 F.3d 720, 722-23 (6th Cir. 1994); *Turpin v. Kassulke*, 26 F.3d 1392, 1401 (6th Cir. 1994); *United States v. Clarke*, 24 F.3d 257, 267-68 (D.C. Cir. 1994); *United States v. Moses*, 15 F.3d 774, 778 (8th Cir. 1994); *United States v. Fontenot*, 14 F.3d 1364, 1371 (9th Cir. 1994); *People v. Ignacio*, 10 F.3d 608, 615 (9th Cir. 1993); *United States v. Macey*, 8 F.3d 462, 467-68 (7th Cir. 1993); *United States v. Johnson*, 1 F.3d 727, 729 (8th Cir. 1993); *United States v. Ostrander*, 999 F.2d 27, 32 (2d Cir. 1993); *United States v. Harwood*, 998 F.2d 91, 98 (2d Cir. 1993); *United States v. Williams*, 993 F.2d 451, 458 (5th Cir. 1993); *United States v. Farley*, 992 F.2d 1122, 1126 (10th Cir. 1993).

16. Eight of these convictions were affirmed on the grounds that the hearsay statement, used by the prosecution, fell within or could have plausibly fallen within one of the exceptions. *Rivera*, 43 F.3d at 1296; *Sowa*, 34 F.3d at 452-53; *Clarke*, 24 F.3d at 267-68; *Moses*, 15 F.3d at 778; *Ignacio*, 10 F.3d at 615; *Ostrander*, 999 F.2d at 32; *Williams*, 993 F.2d at 458; *Farley*, 992 F.2d at 1126. Five of the convictions were affirmed on the grounds that the hearsay statement, proffered by the defendant, did not properly fall within one of the exceptions. *Brewer*, 36 F.3d at 271-72; *Winters*, 33 F.3d at 722-23; *Fontenot*, 14 F.3d at 1371; *Macey*, 8 F.3d at 467-68; *Harwood*, 998 F.2d at 98. One of the convictions was affirmed on the grounds that, although the hearsay proffered by the defendant fell within one of the exceptions, the exclusion was harmless error. *Johnson*, 1 F.3d at 729. In another case the appellate court vacated a writ of habeas corpus granted to the petitioner based upon the state's argument that evidence proffered by the state at trial and excluded by the trial judge should have been admitted under Rule 803(3). *Turpin*, 26 F.3d at 1401.

The conviction was reversed in only two of the 18 cases. In one the court found that the hearsay, proffered by the defendant, did fall within Federal Rule of Evidence 803(3). *United States v. Veltman*, 6 F.3d 1483, 1495 (11th Cir. 1993). In the other reversal, the court found that the hearsay used to convict the defendant did not fall within one of the exceptions. *United States v. Joe*, 8 F.3d 1488, 1493 (10th Cir. 1993).

17. Ten of the twelve convictions were affirmed on the grounds that the hearsay statement, offered by the prosecution, was properly admitted under one of the exceptions. *People v. Coit*, 621 N.Y.S.2d 1023 (App. Div. 1994); *People v. Parson*, 619 N.Y.S.2d 372 (App. Div. 1994); *People v. Buie*, 615 N.Y.S.2d 794 (App. Div. 1994); *People v. Victor R.*, 613 N.Y.S.2d 567 (App. Div. 1994); *People v. Castro-Garcia*, 612 N.Y.S.2d 711 (App. Div.

gestae exceptions should be abolished because judges apply them arbitrarily, and without consideration for the erroneous assumptions beneath the exceptions; namely, that veracity is the child of remarks uttered during the stress of excitement or spoken in contemporaneous, non-reflective observation.

Unlike the many reformists who advocate outright abolition of the hearsay rule or a wholly new exclusionary framework for hearsay,<sup>18</sup> a few commentators propose reform through specific adjustments in the rule's schema.<sup>19</sup> But the reformists who would change the contours of the hearsay rule usually fail to articulate systematically the reasons for retaining the present exclusionary framework with its list of exceptions.<sup>20</sup>

In two respects this Article is quite different from the standard argument: first, by exploring empirical data and normative principles,

1994); *People v. Davis*, 610 N.Y.S.2d 63 (App. Div. 1994); *People v. Woods*, 610 N.Y.S.2d 108 (App. Div. 1994); *People v. Torres*, 601 N.Y.S.2d 919 (App. Div. 1993); *People v. Perez*, 600 N.Y.S.2d 6 (App. Div. 1993); *People v. Hawkins*, 598 N.Y.S.2d 72 (App. Div. 1993).

One conviction was affirmed on the grounds that the hearsay statement, proffered by the defendant, did not properly fall within one of the exceptions. *People v. Orth*, 607 N.Y.S.2d 415 (App. Div. 1994).

The appellate court reversed the conviction in only one case, where the court found that the excluded hearsay should have been admitted pursuant to the present sense impression exception to the hearsay rule. *People v. Leslie*, 620 N.Y.S.2d 30 (App. Div. 1994).

18. See Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495, 519 (1987) (addressing the "assumption that general knowledge and experience form the basis of rational decision-making"); Paul J. Brysh, Comment, *Abolish the Rule Against Hearsay*, 35 U. PITT. L. REV. 609, 609 (1974); Mary Morton, Note, *The Hearsay Rule and Epistemological Suicide*, 74 GEO. L.J. 1301, 1310 (1986) (asserting that the focus should not be on the reliability or unreliability of hearsay, but on "what is known about any particular hearsay statement and whether that is enough to draw a conclusion about the accuracy of the statement"); Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1815 (1980) (asserting that "virtually all criteria seeking to distinguish between good and bad hearsay are either incoherent, inconsistent, or indeterminate").

19. See Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431 (1986); Kenneth E. Kraus, Comment, *The Recent Perception Exception to the Hearsay Rule: A Justifiable Track Record*, 1985 WIS. L. REV. 1525; Joseph W. Rand, Note, *The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempt to Restrain Judicial Discretion*, 80 GEO. L.J. 873 (1992).

20. One commentator has recently undertaken the herculean task of describing the development of the hearsay rule from its inception to current "post-modern" reform proposals. Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367 (1992). Although Mueller alternately defends and criticizes various aspects of the rule, it would be misleading to include him in that group of reformers who systematically argue for a change to the rule.

the Article articulates and defends the basic tenets of the hearsay rule; and second, the Article dissects the limited but viable screening function of the hearsay exceptions. Only then does the Article proceed to demonstrate how the *res gestae* exceptions fail to function as a proper screening device and argue for their abolition.

Part II of this Article presents the theoretical framework under which the hearsay rule is constructed and describes the way in which the exceptions to the rule operate as a screening device for wholly unreliable evidence. Part III describes the primary criticisms that have been leveled against the rule and attempts to answer these critics. Part IV explains the theoretical and practical problems with the *res gestae* exceptions in light of the underlying theory of the hearsay schema. Finally, Part V examines the possible alternatives for admission of probative, reliable hearsay that would otherwise be excluded without the *res gestae* exceptions.

## II. THEORETICAL JUSTIFICATIONS FOR THE HEARSAY RULE

Before examining the functional aspects of the rule against hearsay, it is necessary to ask the question, "Why exclude hearsay in the first place?" To answer this question, it will be helpful to imagine the following series of events:<sup>21</sup>

An upscale shopping mall, located in an affluent, predominantly white suburb, has been experiencing a rise in crime. Community and merchant groups have met several times to discuss their concern over "young thugs" who regularly loiter throughout the mall. Patronage of the mall has decreased dramatically. The local newspaper recently ran an editorial opposing a plan to extend the city's subway system from the predominantly Hispanic and African American populated central city to the mall.

The day following the editorial, a group of African American teenagers enters a record store and begins to browse through the cassette tape section. The manager of the store keeps a close eye on the group and becomes suspicious when one of the youths moves his hand to the

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21. In addition to exposing the systemic procedural infirmities of the *res gestae* exceptions, this hypothetical suggests that the exceptions may serve as a vehicle to facilitate racial stereotyping and scapegoating. In the hypothetical, an excited utterance—the product of white suburban fear and racism—leads to the conviction of an innocent African American youth.

inside of his jacket. As several customers, including the group of teens, exit through the front entrance, the store's theft detection device is triggered. The young man who had seemed suspicious to the manager begins to walk away from the store quickly, and eventually moves into a fast trot. At that moment, the manager, who had been working the cash register, exclaims, "The one in the red hat stole a tape! That's him running away." Minutes later a mall security guard apprehends a young African American man wearing a red cap. Despite the fact that the guard finds no cassette tapes in the youth's possession, the suspect is arrested and booked on shoplifting charges.

At the young man's trial, against the vociferous hearsay objections of defense counsel, the judge allows several customers to testify as to the store manager's exclamation. According to the judge, "the circumstances surrounding the statement clearly render it an 'excited utterance.'" The jury returns a guilty verdict. When interviewed later, one juror confesses, "Although the manager seemed less than sure of what actually happened, there were so many other witnesses who heard him identify the black man. Besides, he looked like a troublemaker."

The preceding hypothetical exposes the basic hearsay infirmities, and demonstrates how an exception to the rule trumps any concern over such infirmities. Advocates of the hearsay rule often center their arguments around three problems that arise when hearsay is used in the formal litigation setting.

#### A. *The Three Problems with Hearsay*

In his article explaining the hearsay rule and its exceptions, Professor Tribe suggests that the hearsay infirmities may be understood by envisioning a "Testimonial Triangle."<sup>22</sup> Familiarity with the device employed by Tribe may encourage a better understanding of the first two hearsay problems. According to Tribe, the trier of fact must utilize a "chain of inferences whenever a witness testifies in

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22. Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 959 (1974).



court.”<sup>23</sup> This “chain” has two links, or as Tribe describes them, the left leg and right leg of the triangle.<sup>24</sup>

The left leg connects the action or utterance, which becomes hearsay when testified to, with the supposed belief of the declarant.<sup>25</sup> In the previous hypothetical, the utterance of the store manager is thought to demonstrate his belief at that moment that the young man had stolen a tape. The “testimonial infirmities” of ambiguity and insincerity may weaken this leg.<sup>26</sup>

The right leg of the triangle connects the declarant’s supposed belief with the conclusion to which the belief points. In our example, when the witness recounts the manager’s statement on the stand, the probable conclusion is that a man fitting the manager’s description stole the tape. This leg may suffer damage if the witness suffers from the “testimonial infirmities” of erroneous memory or faulty perception.<sup>27</sup>

### 1. The problem with the declarant and the statement

The first problem with hearsay is that the trier of fact cannot test the demeanor of the declarant in the course of litigation. This

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23. *Id.* at 958.

24. *Id.* at 959, 963.

25. *Id.* at 959.

26. *Id.*

27. *Id.* Without mentioning his schematic contribution to the hearsay debate, the Advisory Committee to the Federal Rules of Evidence seemed to echo Professor Tribe’s concerns about hearsay. FED. R. EVID. 801 advisory committee’s introductory note. The committee gave four justifications for the exclusionary rule. First, the declarant was not under oath when making the alleged statement. *Id.* Second, the declarant did not make the alleged statement in the courtroom—in the sobering presence of the judge and jury. *Id.* Third, the way in which the witness perceived the statement, the ability of the witness to remember the statement clearly, or the witness’s skill in recounting the statement in a coherent fashion may be faulty. *Id.* Fourth, the witness recounting hearsay testimony may be more inclined to disclose selective portions of the declarant’s statement, or may be less candid than she would otherwise be if providing her own version of events, live on the stand. *Id.*

Just as Tribe noted the left leg infirmities of declarant ambiguity and insincerity, the committee’s concern that the declarant may have fabricated the testimony appears to lie at the heart of its first two justifications. Compare Tribe, *supra* note 22, at 959 (asserting that ambiguity and insincerity are two infirmities that may occur between the declarant’s act or assertion and the declarant’s belief in what his or her act or assertion suggests) with FED. R. EVID. 801 advisory committee’s introductory note (discussing a witness’s reticence to falsify testimony in court). Furthermore, Tribe’s right leg infirmities of memory and perception demonstrate a fear of poor witness’s performance, also seen in the second two advisory committee justifications. FED. R. EVID. 801 advisory committee’s note; Tribe, *supra* note 22, at 959.

weakness is the primary problem underpinning the left leg of Tribe's model. Because the declarant made the statement outside the courtroom, the jury has no opportunity to evaluate the declarant's testimony and determine its reliability. Even if the declarant is available, there is simply no way to conduct a "normal" cross-examination of the declarant at the time the statement is uttered. In our hypothetical a profoundly confused, preoccupied, and agitated store manager may have exclaimed, "The one in the red hat stole a tape!" but there is no way for the jury to evaluate the declarant's demeanor at the time of exclamation. Moreover, if the declarant, or another witness, later gives a persuasive recitation of the statement, this may only serve to bolster its believability. The first concern regarding hearsay, therefore, looks exclusively at the behavior, motives, sincerity, and other attributes of the declarant.

## 2. The problem with the testimony of the witness

The second hearsay problem, evidenced in the right leg of Tribe's model, rests on a concern that the witness may either fail to give a truthful or accurate account of the declarant's hearsay statement or that a witness's verbatim account of the declarant's statement may be extremely misleading. Again, consider our hypothetical where one or more witnesses have come forward to testify, "All of the sudden, there was a lot of commotion and I heard the manager yell, 'The one in the red hat stole a tape!'" Unlike the problem with declarant reliability, these in-court witnesses are subject to examination before the trier of fact. Therefore, one might suggest that defects in the witness's testimony regarding the hearsay should be just as easily uncovered as defects in non-hearsay testimony. In other words, absence of cross-examination should not be a concern when addressing this second reason for excluding hearsay.

A proponent of the hearsay rule would likely disagree and suggest that recollections of statements differ greatly from descriptions of events.<sup>28</sup> The verbal nature of the hearsay communication presents the problem.<sup>29</sup> For instance, it may be difficult to conduct a probing examination of a witness who is recounting a verbal statement. The witness may simply report, "I heard what I heard." If no other witness comes forward to refute the alleged statement or gives

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28. See, e.g., Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 57 (1987).

29. *Id.* at 57-58.

an alternate version of events, examining the witness about the declarant's utterance is effectively over. After all, what is the cross-examining attorney to do? Apart from attempts to discredit the witness by suggesting that the witness was far away, could not hear the statement, or the witness's testimony is otherwise unreliable, the statement has been repeated in front of the trier of fact without much effective resistance. If the witness did not see the incident, but only heard it, the attorney will be hard-pressed to conduct any meaningful cross-examination as to the truth of the matter asserted. In contrast, examination of a witness who is describing a non-verbal incident may be more successful in probing the details of the event, uncovering inconsistencies, and pointing to a lack of corroboration on the part of other witnesses.<sup>30</sup>

### 3. The problem with jury misperception of the hearsay

The third and final concern driving the arguments in favor of the hearsay rule centers on the psychological limitations of juries. Simply stated, the jury may fail to weigh properly the possible infirmities in the witness's testimony. Jury members who overlook the possibility that the declarant was confused or had reason to fabricate the statement, or who consider the hearsay testimony to be of equal probative value as live testimony, heighten the probability of a verdict based heavily on hearsay and the likelihood of greater abuse of hearsay testimony, in the form of outright fabrication or selective memory. It is not difficult to imagine that the persuasiveness of the witness who recounts the hearsay statement—rather than the reliability of the hearsay itself—may have a direct bearing on the weight given to the statement by the jury.<sup>31</sup> For instance, one might assume that the party to whom the hearsay is detrimental would rather hear the statement recounted on the stand by a homeless alcoholic than by a prominent neurosurgeon. Such prejudices may affect the jury regardless of the quality of the declarant's statement or the extent to which the witness's testimony is impeached. Although

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30. See RICHARD O. LEMPert & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 520-21 (2d ed. 1982).

31. "[P]ractitioners strongly believe that juries, and to some extent judges, decide cases largely on what they see happening in the courtroom. Practitioners see, in other words, a danger that factfinders may misappraise hearsay because they attribute to remote statements the credibility of the witness who reports them." Mueller, *supra* note 20, at 392.

a lawyer can argue this problem of perceptions to the jury,<sup>32</sup> one must wonder if reminding the jury of a "good" hearsay statement is a wise strategy in closing argument.

As demonstrated in our shoplifting example, the cumulative effect of the hearsay testimony of several witnesses before the jury may even serve as pseudo-corroboration. The witness testifying not only recounted the manager's words, but also indirectly supported the manager's version of events. An example of the way that judges and juries view repetitive hearsay testimony may help to illustrate this point. In *People v. Torres*<sup>33</sup> the victim of multiple gunshot wounds, while laying on a stretcher at the scene of the shooting, made a "show-up" identification of the defendant who was then in police custody.<sup>34</sup> The victim exclaimed, "That's him!"<sup>35</sup> Despite the victim's "conflicting testimony before the grand jury" eight days after the shooting,<sup>36</sup> the appellate court affirmed the trial court's admission of the hearsay and reached the following disturbing conclusion: "[A]ny bolstering created by the repetition of the excited utterance by two police officers who had heard it, was harmless, as it could not reasonably have led the jury to believe that there was stronger identification evidence than actually existed."<sup>37</sup> The *Torres* court's cursory treatment of the possible corroborative effect of repetitive hearsay on the jury's decision mandates a closer look at the empirical data on the subject.

Several recent studies suggest that concerns over jury competence, especially in the hearsay context, are exaggerated.<sup>38</sup> For instance, in a study by Margaret Kovera comparing mock juror reactions to eyewitness testimony and hearsay testimony,<sup>39</sup> evidence developed under both good and bad witnessing conditions was presented to the jurors.<sup>40</sup> The study found that "jurors are, in fact, skeptical of hearsay evidence and capable of differentiating between

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32. For instance, the lawyer might remind the jury that, "It doesn't matter how many witnesses heard the store manager identify the alleged shoplifter if the manager's statement of identification was erroneous in the first place."

33. 601 N.Y.S.2d 919 (App. Div. 1993).

34. *Id.* at 920.

35. *Id.*

36. *Id.*

37. *Id.*

38. See, e.g., Margaret Bull Kovera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703 (1992).

39. *Id.* at 709-10.

40. *Id.* at 709.

accurate and inaccurate hearsay testimony.”<sup>41</sup> Furthermore, Kovera determined, “[t]he findings that jurors are insensitive to the quality of eyewitness testimony, yet are sensitive to the relative accuracy of hearsay evidence, challenge the legal assumption that jurors can accurately judge the validity of eyewitness testimony but are incapable of judging the reliability of hearsay testimony.”<sup>42</sup> Kovera pointed to a similar study that presented mock jurors in a criminal trial with “identical” hearsay and eyewitness evidence and found the conviction rate lower when hearsay was involved.<sup>43</sup> Kovera concluded that “[t]hese findings provide some empirical support for the notion that the legal system should provide jurors with any information that may assist them in resolving the case, including hearsay evidence.”<sup>44</sup>

Other commentators have presented similar empirical data but have declined to support such wholesale inclusion of hearsay.<sup>45</sup> According to Stephan Landsman and Richard Rakos, “hearsay that was not highlighted as inappropriate, and that was introduced within the context of a substantial volume of other evidence, appeared to exert minimal influence on the ultimate outcome of the trial.”<sup>46</sup> Despite presenting empirical data reaching virtually the same conclusions as Kovera, Landsman and Rakos suggest other justifications for retention of the hearsay rule.<sup>47</sup> Among these are a desire to maintain public confidence and the appearance of fairness in judicial decisions, along with a concern over giving “unbridled discretion” to judges.<sup>48</sup>

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41. *Id.* at 704.

42. *Id.* at 720.

43. *Id.* at 705 (citing Peter Miene et al., *The Evaluation of Hearsay Evidence*, Paper presented to the American Psychological Association in Boston, Mass. (Aug. 1990)).

44. *Id.* at 722.

45. See, e.g., Stephan Landsman & Richard F. Rakos, Research Essay, *A Preliminary Empirical Enquiry Concerning the Prohibition of Hearsay Evidence in American Courts*, 15 LAW & PSYCHOL. REV. 65, 76 (1991).

46. *Id.*

47. *Id.* at 80-81.

48. *Id.* (citing Roger Park, *The Hearsay Rule and the Stability of Verdicts*, 98 HARV. L. REV. 1357, 1372-75 (1985)); see also Mueller, *supra* note 20, at 397 (“It is not clear that judges will perform better without rules to apply. Practitioners strongly believe they need protection against broad judicial discretion.”).

Landsman and Rakos also point to problems in the research methods used to date, including the inability to replicate courtroom conditions through the presentation of live testimony, typical deliberation by a jury panel, and use of a representative jury pool. Landsman & Rakos, *supra* note 45, at 77-79. An example of this kind of deficiency in empirical method can be seen in the Kovera study, where the differences between the typical trial juror profile and the study’s mock juror profiles were stark, as were the

In a separate article, written as a companion to the Kovera study, Rakos and Landsman conclude that "[t]here has not yet been enough hearsay research to warrant a discussion of reform on empirical grounds."<sup>49</sup> The authors cite several examples of specific concerns that have not been sufficiently studied, including "how large a ratio of hearsay to nonhearsay statements jurors are able to handle effectively,"<sup>50</sup> and whether "voir dire procedures [can] be developed to identify jurors unable to weigh the second-hand nature of hearsay competently."<sup>51</sup> Even Kovera ends her article with the caveat that "[t]he juror's evaluation of hearsay might differ . . . in a case with a great deal of emotional appeal."<sup>52</sup> And although Kovera and others suggest that problems of jury overemphasis may be cured by judicial instruction,<sup>53</sup> Rakos and Landsman have posited the theory that judicial admonitions as to the proper weight to be given hearsay may have the opposite effect of actually encouraging the jury to give the evidence more weight.<sup>54</sup>

Despite the infirmities of the various studies, jury misperception is not as persuasive an argument for excluding hearsay as it once was. Nevertheless, the absence of more thorough, reliable empirical studies, the persistent concerns over the reliability of the declarant's statement and the performance of the witness, and the need for public confidence in judicial decisions, lead to the conclusion that the hearsay rule continues to provide an important protective function.<sup>55</sup> As the authors of one article argue:

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differences in the circumstances surrounding the testimony. Kovera et al., *supra* note 38, at 707-10. The Kovera "jury" consisted of 162 undergraduate students who received either course credit or remuneration for their efforts. *Id.* at 707. The hearsay testimony was not presented in a trial setting. *Id.* at 708-10. Indeed, the hearsay evidence—in the form of videotaped testimony—immediately followed live testimony and mirrored the live testimony, thus standing in sharp contrast to the eyewitness testimony. *Id.* Furthermore, the hearsay evidence was unaccompanied by any other evidence which would usually be expected to be presented at trial. *Id.*

49. Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655, 676 (1992).

50. *Id.* at 679.

51. *Id.* at 681.

52. Kovera et al., *supra* note 38, at 722.

53. *Id.* at 721; Jack B. Weinstein, *Alternatives to the Present Hearsay Rules*, 44 F.R.D. 375, 377 (1968).

54. Rakos & Landsman, *supra* note 49, at 661.

55. Mueller notes that "the absence of more extensive empirical evidence has proved to be a great embarrassment, at least to academic commentators." Mueller, *supra* note 20, at 378.

Hearsay cannot be treated as just another form of evidence without transforming adjudication into another process. For the trier of fact, whatever the force of a particular piece of hearsay, treating hearsay as ordinary evidence always involves a compromise of principle. For that reason, the burden of proof should fall upon those who propose to admit hearsay evidence into the deliberations of the court . . . .<sup>56</sup>

### *B. The Purpose of the Hearsay Schema*

#### 1. Procedural concerns about hearsay

The hearsay schema overcomes some of the above-mentioned problems by providing a prophylactic function as the jury considers the evidence. Hearsay cannot be subjected to the same rigorous testing that most evidence must endure in the course of litigation, further exacerbating its already inherent deficiencies. In formulating the response of the Federal Rules of Evidence to hearsay, the Advisory Committee pointed to several missing safeguards.<sup>57</sup> Among these, the committee voiced its concern that the hearsay statement is not made under oath, the jury is not given the benefit of viewing the declarant's demeanor, and, most notably, there is no opportunity for the opponent to cross-examine the declarant.<sup>58</sup> Of all the potential screens, it is the absence of cross-examination that has been the linchpin of the hearsay rule.<sup>59</sup> It is important to look briefly at the significant role that cross-examination has played in the hearsay debate, and the substantial acceptance that the doctrine continues to receive in the academic community.

#### 2. The impossibility of cross-examination

Wigmore based his entire theory of the hearsay rule on a belief that "the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested asser-

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56. Mortimer R. Kadish & Michael Davis, *Defending the Hearsay Rule*, 8 LAW & PHIL. 332, 349 (1989).

57. FED. R. EVID. 801 advisory committee's introductory note.

58. The Advisory Committee's notes to the Federal Rules of Evidence emphasize that this concern over the lack of cross-examination focuses on both the jury and the witness. See FED. R. EVID. 801 advisory committee introductory notes. First, the jury is deprived the benefit of deriving "valuable clues" from the demeanor of the declarant upon often rigorous cross-examination. *Id.* Second, cross-examination is believed to be "effective in exposing imperfections of perception, memory, and narration." *Id.*

59. 5 WIGMORE, *supra* note 3, § 1362.

tion of a witness, may be best brought to light and exposed by the test of Cross-examination.”<sup>60</sup> Specifically, Wigmore believed that cross-examination provided four essential elements that are not uncovered in direct testimony by the proponent or by examination of witnesses other than the declarant: (1) undisclosed “qualifying circumstances” under which the statement was made; (2) “facts which diminish the personal trustworthiness” of the declarant; (3) immediate contrast of the cross-examination testimony with conflicting direct testimony; and (4) refutation of the earlier testimony by the declarant.<sup>61</sup>

Although the availability of the declarant to testify may alleviate some of these fears, applying our shoplifting hypothetical to Wigmore’s suppositions exposes the reality of the cross-examination problem—even when the declarant later takes the stand. Imagine that we have somehow transported the trial, with judge, jury, and lawyers, to the moments just following the supposed theft and the store manager’s exclamation. Within minutes of the manager’s excited utterance, defense counsel may begin to question the manager about the “qualifying circumstances” existing at the time. What did the store manager see? Did the manager have a good look at the alleged culprit? What was the store manager doing just before he made the statement? Although it is true that all of these questions may be asked of a declarant who later testifies at trial, it seems probable that the opportunity for studied fabrication, as well as the advent of real or “convenient” problems with recollection, are more likely when the declarant/witness presents the statement as attenuated hearsay.<sup>62</sup> Likewise, even if the defense attorney uses evidence of the store manager’s personal bias to impeach the hearsay testimony, or offers conflicting direct testimony to refute the hearsay, the effect, if any, on the declarant’s version of his story may be minimal.<sup>63</sup> An unknown or unavailable declarant only heightens these concerns, such as when the courts admit statements by anonymous “911” callers under one of the *res gestae* exceptions and those statements are only “witnessed to”

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60. *Id.*

61. 6 WIGMORE/CHADBURN, *supra* note 1, § 1368.

62. *See* Park, *supra* note 28, at 57-58. Park maintains that the absence of cross-examination appears to present an opportunity for abuse because the chance of undetected ordinary forgetfulness or outright fabrication on the part of the witness is heightened. *Id.*

63. *See id.* Park argues that the witness can blame any inconsistency or vagueness in his testimony on the hearsay nature of the proffered statement. *Id.* For instance, the witness may successfully testify without a well-defined account of the time, place, and circumstances under which the declarant made the alleged statement.



by a tape recorder.<sup>64</sup> In these cases, the "qualifying circumstances" under which the declarant made the statement and the "personal trustworthiness" of the declarant are unknowable, while cross-examination of the declarant or recantation by the declarant is impossible.

Although many of Wigmore's suppositions regarding the nature of human behavior have been refuted by modern scholars,<sup>65</sup> his belief in the efficacy of cross-examination still enjoys wide acceptance.<sup>66</sup> The authors of one textbook suggest that of all the safeguards that exist to ensure the reliability of evidence

the opportunity to cross-examine is the most important. Ideally, cross-examination may clear up ambiguity, expose insincerity, and point out those factors which should lead jurors to suspect a witness' memory or to question his ability to observe clearly the events described. In practice, cross-examination rarely destroys a witness' testimony, but it often leads to the qualification of unqualified assertions, indicates motives to deceive, and suggests to the jurors the kind of critical stance they should take toward the testimony.<sup>67</sup>

Professor Tribe's assertion that "[t]he basic hearsay problem is that of forging a reliable chain of inferences, from an act or utterance of a person not subject to contemporaneous in-court cross-examination about that act or utterance, to an event that the act or utterance is supposed to reflect,"<sup>68</sup> provides further evidence of the acceptance of Wigmore's baseline assumption. Mueller states that "[c]ross-examination cannot make . . . the witness reliable, but it does give the defendant a chance to test and challenge their stories so the jury can evaluate them."<sup>69</sup>

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64. See *Ware v. State*, 596 So. 2d 1200 (Fla. Dist. Ct. App. 1992); *People v. Hang Fan Ko*, 589 N.Y.S.2d 162 (App. Div. 1992); see also Mueller, *supra* note 20, at 393 ("The connection of an eyewitness to the realities of the events in litigation is fuller than the connection of an 'earwitness' to statements describing such events, and the testing process provided by trials works better when the person being tested has firsthand knowledge of salient facts.").

65. For an exploration of Wigmore's *res gestae* justifications, see *infra* part IV.C.

66. LEMPERT & SALTZBURG, *supra* note 30, at 352; Mueller, *supra* note 20, at 391; Tribe, *supra* note 22, at 958.

67. LEMPERT & SALTZBURG, *supra* note 30, at 352.

68. Tribe, *supra* note 22, at 958.

69. Mueller, *supra* note 20, at 391.

### C. Exceptions to the Hearsay Rule

#### 1. The screening function of the hearsay exceptions

The exceptions to the hearsay rule serve as a "procedural" substitute for the missing "substantive" reliability check usually provided by cross-examination. This safeguard allows the jury to consider the probative value of the hearsay evidence alongside live testimony. The exceptions serve as a substitute for the screening typically carried out by the cross-examination of the declarant, the opportunity for the jury to see the declarant make the statement, and the oath-taking of the witness in the courtroom.<sup>70</sup> As one commentator observed, "[i]f a hearsay statement is made under circumstances guaranteeing its accuracy and trustworthiness, the purpose for exclusion is defeated . . . [and] the need for conducting cross-examination . . . is rendered irrelevant."<sup>71</sup> Thus, each exception is believed to possess particular characteristics that ensure a baseline level of reliability. For instance, Federal Rule of Evidence 803(8) provides an exception for public records on the belief that "[t]he special trustworthiness of official written statements is found in the declarant's official duty and the high probability that the duty to make an accurate report has been performed."<sup>72</sup> The indicia of reliability that scholars and courts have historically identified to justify the *res gestae* exceptions to the hearsay rule are outmoded and disproved.<sup>73</sup> Ultimately, they fail to carry out their reliability screening duties in an effective manner.<sup>74</sup>

#### 2. The purpose of screening and the resulting benefits

The minimal level of reliability ensured by the categorical exceptions diminishes the concern that the jury may consider hearsay without adequate regard for its infirmities. As already discussed, the relative ability of juries to digest adequately and evaluate the inherent

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70. See, e.g., *Hutchcraft v. Roberts*, 809 F. Supp. 846, 848 (D. Kan. 1992) ("Reliability may be inferred if the statement falls within a firmly rooted hearsay exception such as an excited utterance. If the statement does not fall within such a category, it is not admissible unless there is a showing of particularized guarantee of trustworthiness.").

71. Kraus, *supra* note 19, at 1530.

72. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 295, at 287-89 (John William Strong ed., 4th ed. 1992).

73. See *infra* part III.

74. See *infra* part IV.

problems with hearsay remains whether the jury is faced with screened or unscreened hearsay.<sup>75</sup> Suppose that a jury hears two pieces of evidence, one properly screened under a sound exception, and another admitted because the opposing counsel failed to object. Like most evidence, and like all hearsay, the reliability of the first piece of evidence is not fully guaranteed. However, its successful passage through a viable screen provides some measure of confidence that cannot be found in the second piece of evidence. The hearsay exceptions operate under the assumption that the jury's ability to properly consider and weigh the hearsay as against live testimony should be no greater in the case of the first evidence than it is in the second. Once hearsay is successfully screened, the jury may make its determination, all the while retaining whatever problems may be peculiar to human perception. Significantly, then, the theory underlying the hearsay exceptions is not concerned with the existence, the absence, or even the questionable nature of empirical data suggesting the capability of the jury to consider hearsay. Indeed, the exceptions to the hearsay rule do not guarantee that the jury will properly weigh the hearsay, but they do ensure against a result that is based entirely on unreliable, untested hearsay. As Professors Hart and McNaughton suggest, the hearsay rule and its exceptions "prevent errant juries from basing an essential finding upon the slender reed of hearsay evidence."<sup>76</sup>

Thus, hearsay that does not come under one of the exceptions is deemed too unreliable to be admitted. This determination not only ensures that the opposing litigant is protected from a jury's improper consideration of wholly unreliable evidence, but also spares the judicial system the embarrassment of appearing as if the jury has reached an erroneous result by basing its decision on untested hearsay.<sup>77</sup> Interestingly, even the Kovera study, which concludes that jurors are equipped to evaluate hearsay responsibly, suggests that the quality of hearsay—its perceived reliability—has a direct impact on juror perception of, and confidence in, the result they reach.<sup>78</sup> It is not surprising, therefore, that other scholars suggest that judgments

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75. See *supra* part II.A.3.

76. Roger Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057, 1059 n.8 (1986) (quoting Henry M. Hart & John T. McNaughton, *Some Aspects of Evidence and Inference in the Law*, in EVIDENCE AND INFERENCE 56 (D. Lerner ed., 1958)).

77. Mueller, *supra* note 20, at 393.

78. Kovera et al., *supra* note 38, at 720.

based heavily on untested hearsay testimony, even "good" hearsay testimony, may have a negative impact on the general public's and the litigant's perception of the judicial system. For instance, Mueller states that the hearsay doctrine reflects process-based concerns over public respect for judgments:

To achieve this larger purpose, rules of procedure and evidence should provide reason for confidence that courts reach correct outcomes by fair means. Probably the hearsay doctrine serves this function. Although lay people do not understand the underlying complexities of even the conventional account, surely the doctrine reflects a common preference to hear from and speak to observers directly, as happens at trial where live witnesses testify under questioning by lawyers. In this respect the doctrine reflects a kind of common sense to which lay people can relate.<sup>79</sup>

Hearsay needs to be screened, and each screen must be sound.

Thus far, this Article has argued that the exclusionary principle and its scheme of exceptions fosters sound judicial decisions and promotes public confidence in those decisions. But what of the other side of the coin? What of those critics who maintain that excluding evidence in a categorical fashion is just as dangerous to the integrity of the system? The following part of this Article examines the arguments that critics levy against the hearsay rule and responds to their arguments.

### III. CRITICISM OF THE HEARSAY RULE

#### A. *The Practitioners' View of Hearsay*

Christopher Mueller points to broad support for the hearsay rule among practicing lawyers and suggests that this may indicate a belief on their part that, in the forensic setting, concrete categories of evidentiary inclusion and exclusion are preferable to a system of broad judicial discretion.<sup>80</sup> The fears of practicing lawyers were perhaps best expressed in a *Saturday Review* cartoon, which portrayed

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79. Mueller, *supra* note 20, at 395.

80. *Id.* at 397. Mueller argues that "[i]t is one thing for Judge Weinstein, who is both a scholar and an extraordinary jurist, to claim judges work better without rules, and quite another to suppose most judges can do so." *Id.* (footnote omitted).

a judge's exclamation, "Sure, it's hearsay—but it's *great* hearsay!"<sup>81</sup> Mueller suggests that scholars who argue for true reform—which, he says, must result in almost unlimited discretion being given to trial judges—are "too much attuned to the academic vision of rationality, and too little attuned to the complexity of concerns underlying the doctrine."<sup>82</sup> Perhaps because of its removal from day-to-day courtroom activities, the academic community is not as acutely aware of the frightening unpredictability of giving the trial judge broad discretion over the admission of hearsay. During the debate over the Federal Rules, one group of trial lawyers warned against "too great a measure of judicial discretion, minimizing the predictability of ruling."<sup>83</sup> The fear of a judicial "free-for-all" may be especially warranted in state courts where many judges are elected officials and are probably less trusted, or able, to make sound and unbiased evidentiary rulings.<sup>84</sup>

### B. *Answering the Critics*

Critics of the hearsay rule argue that it often excludes reliable evidence and admits unreliable evidence based on a patchwork of incoherent principles.<sup>85</sup> Morgan's famous quote that "a picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists"<sup>86</sup> probably articulates the views of numerous academics. Many of the categorical exceptions, including excited utterance, state of mind, and present sense impression do not seem rational when viewed as part of the scheme of exceptions.<sup>87</sup> For instance, as will be explored in Part IV of this Article, the term "trustworthiness" can hardly be used to describe the utterances of a person made under extreme physical or emotional duress. Furthermore, as previously discussed, some reformers believe that juries can adequately process hearsay that is freely admitted.<sup>88</sup>

81. Jon R. Waltz, *Present Sense Impressions and the Residual Exceptions: A New Day for "Great" Hearsay?*, 2 LITIG. 22, 23 (1975).

82. Mueller, *supra* note 20, at 369.

83. Waltz, *supra* note 81, at 22.

84. LEMPERT & SALTZBURG, *supra* note 30, at 523.

85. See, e.g., Edmund M. Morgan & John M. Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937).

86. *Id.*

87. See Mueller, *supra* note 20, at 374.

88. See *supra* part II.A.3.

But neither instituting a radically new exclusionary system simply because some of the exceptions to the old system are intellectually untenable, nor throwing out the hearsay rule based solely on the scant data regarding juror performance, is a proper alternative in the effort to bring proper evidence into court. If one accepts the arguments made in favor of the rule—namely, that unrestrained judicial discretion is an unacceptable substitute for the categorical exclusion of unreliable hearsay testimony—then the solution to the problem lies in refining or abolishing the exceptions that rest on questionable theoretical foundations.

Perhaps most persuasively, critics argue that in our daily interactions we often make decisions based on hearsay evidence.<sup>89</sup> According to some, the hearsay rule is primarily a remnant of a legal system in which judges did not trust the “lower-class” jury with the duty of evaluating problem testimony.<sup>90</sup> In contrast, today’s jurors are well-acquainted with hearsay and are aware of its benefits and difficulties. As Mueller notes,

[c]ritics point out that the hearsay doctrine evolved long before mass communication and universal public schooling, and claim modern jurors are sophisticated enough to evaluate hearsay. In their experiences in life, the argument runs, jurors acquire an understanding far more discerning than the simple tests courts apply in excluding hearsay.<sup>91</sup>

Why not, therefore, allow jury members to make decisions in the same way they usually do?

The answer to this criticism lies in exploring the nature of the relationships in which we make decisions. True, a child may be rewarded based on the report given by the school teacher, or one corporation may seek to take over another because of illegally acquired insider information, or one spouse may divorce the other spouse based on the rumor of friends. Regardless of the magnitude of the nonjudicial decision, however, the use of hearsay in court differs from its use in daily life in three significant respects.

First, when using hearsay in making ordinary decisions, we often know both the person who made the alleged statement and the person

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89. Mueller, *supra* note 20, at 374; see *supra* part II.A.3 (noting those who criticize the rule on the basis of everyday familiarity with hearsay).

90. Weinstein, *supra* note 53, at 377.

91. Mueller, *supra* note 20, at 374 (citing Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1363 (1987)).

reporting it. This particular knowledge of the individuals involved, plus the information we have regarding the extent of their knowledge of the transaction, provides a method for determining the reliability of the everyday hearsay that is unavailable in the litigation setting—where jurors are required to be disinterested, uninformed, and unbiased toward the litigants and witnesses.<sup>92</sup> The person evaluating everyday hearsay determines how much weight, if any, to give the reported statement.<sup>93</sup> That person may choose to act on the information, to wait until more information is available, or to refrain from acting. A similar willingness to postpone a decision until all information has been gathered and a full inquisition has been made may explain why hearsay is more freely admitted in the nonjury continental legal system. Our system simply does not afford the luxury of time that exists in everyday situations or in the continental tradition.<sup>94</sup>

Second, decisions made in the courtroom often have enormous consequences—even the life or death of the accused. Although everyday decisions may be quite crucial, the evaluator of the hearsay is very often the same person who will be affected by any decision based on the hearsay. The person making an important decision in the nonlegal setting has, like the jury in the courtroom, the option to accept, deny, or discount hearsay. But as Mueller points out, the issues presented at trial are very different from those made in business and personal life:

Ordinary people have little or no exposure to the forces that operate during litigation, and the ways these forces affect statements collected with an eye toward trial, and little or no familiarity with the most common kinds of litigation-producing events, from crimes to collisions to toxic or defective products.<sup>95</sup>

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92. *Id.* at 383.

93. Swift, *supra* note 18, at 499.

The crucial point about an Abstract Declarant is that the trier of fact receives very little information related to the declarant's four testimonial qualities of perception, memory, sincerity and language use. The trier of fact thus has little factual basis upon which to apply its own general knowledge and experience about what kinds of observers are reliable in making those inferences that are necessary to evaluate the reliability of the particular declarant's statements.

*Id.*

94. Mueller, *supra* note 20, at 383 (citing Mirjan Damaska, *Of Hearsay and its Analogues*, 76 MINN. L. REV. 425, 444 (1992)).

95. *Id.* at 383-84.

Similarly, Park notes that the average juror, although familiar with everyday hearsay, is not accustomed to the game playing that occurs in litigation:

The problem is exacerbated in situations where one of the attorneys has had the opportunity to prepare the out-of-court declarant, as when the proffered statement is an affidavit prepared by the attorney and signed by the witness. Here, both sides have "sandpapered" their witnesses, but only one has had the opportunity to expose the sandpapering through cross-examination. Jurors may not be familiar with sophisticated ways of implying something without actually saying it, or of omitting information in a way that makes the affidavit literally true but false in its implications.<sup>96</sup>

Furthermore, experience suggests that persons faced with vital decisions in everyday life may be less likely to rely on hearsay.

Finally, because of the corporate nature of the decision, the imposition of a penalty by the state, and the possibility of an unrectifiable mistake, the very integrity of the judicial system may be at stake when a jury bases its decision on questionable hearsay. Certainly, major business and personal decisions hinge on everyday hearsay. But even when the stakes are high in the nonjudicial context, there is a person, whether corporate executive, spouse, or parent, who will bear the responsibility for an erroneous decision based on hearsay. In the litigation setting, however, public trust must ultimately rest on the integrity and strength of the system in its search for the truth.

#### IV. THE PROBLEM WITH THE RES GESTAE EXCEPTIONS IN THIS VISION OF TRUTH FINDING: AN ARGUMENT FOR ABOLITION OF THE EXCEPTIONS

As previously discussed, improperly screened hearsay carries dual risks: first, that the jury will not consider that the hearsay may be less reliable than live testimony and, second, that the public will not have confidence in a verdict based heavily on "suspect" hearsay testimony.<sup>97</sup> To function effectively, therefore, the screening exceptions must be strong enough to overcome these risks.

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96. Park, *supra* note 28, at 61 n.40.

97. See *supra* part II.



### A. *The Theory Underlying the Res Gestae Exceptions*

Typically, the twenty-seven exceptions to the hearsay rule, plus the residual or "catch-all" exceptions, are justified by either the supposed trustworthiness of the proffered statement, the statement's supposed necessity, or both.<sup>98</sup> For instance, the previous testimony of an unavailable declarant, made in court under full and fair cross-examination, is admissible under Rule 804(b)(1) on the grounds that the value of the testimony and the inability to procure the live testimony both weigh against exclusion of the testimony.<sup>99</sup> Rule 803(5), in contrast, allows admission of recorded recollections, noting only the inherent trustworthiness "in a record made while events were still fresh in mind and accurately reflecting them."<sup>100</sup>

The *res gestae* exceptions are based in the trustworthiness element of the exception justifications. Recalling that the possibility of fabrication, memory loss, or poor communication by the witness before the jury are major justifications for the exclusionary rule,<sup>101</sup> it is not surprising that many written materials are excepted.<sup>102</sup> Written materials simply are not susceptible to unintentional alterations by the witness, and intentional manipulation of such material is very difficult. The same cannot be said for verbal statements, particularly *res gestae* hearsay, which is always verbal and often made under frantic conditions or attenuated circumstances.

Another supposed guarantor of trustworthiness, however, is the "transactional" nature of particular statements. Such statements, which include the *res gestae* exceptions, are thought by some to possess a higher degree of reliability than non-transactional statements because they surround the event in question.<sup>103</sup> For instance, the

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98. See, e.g., Mueller, *supra* note 20, at 370 n.9; Park, *supra* note 28, at 69-70.

99. This exception also recognizes the procedural safeguards employed in the previous trial, and therefore contains overtones of the trustworthiness exception. FED. R. EVID. 804(b)(1) advisory committee's note.

100. FED. R. EVID. 803(5) advisory committee's note. The trustworthiness concern is also observed in other exceptions based on written evidence, such as commercial publications (803(17)), treatises (803(18)), or regularly kept business records (803(6)).

101. See discussion *supra* part II.A.2.

102. See, e.g., FED. R. EVID. 803. Fourteen of the 24 exceptions to the hearsay rule involve writings, records, or certificates. *Id.*

103. Indeed, Mueller goes so far as to suggest that "it seems at least plausible to admit statements closely associated with the events in litigation—what we used to call 'res gestae' and Park now calls 'transactional statements.'" Mueller, *supra* note 20, at 389 (footnote omitted). "[T]he principle utility of the exception is in exposing juries to the parties'

statement of the store manager in our shoplifting hypothetical clearly demonstrates an excited utterance due to the supposed stress under which it was made. Similarly, an unidentified person at the scene of an accident might make a contemporaneous statement that appears to be quite probative, and although the statement is not made "under pressure," it is nonetheless deemed an impression of the declarant's present sense and part of the *res gestae*.<sup>104</sup> In theory, this intimate connection between event and statement reduces the likelihood of fabrication, forgetfulness, or misinterpretation. Park states the argument as follows: "the witness does not have freedom to choose a convenient time and place to hear a fictional declarant or statement, and therefore the witness's fabrication might be exposed by other witnesses or by circumstantial evidence."<sup>105</sup> Because transactional statements are closely related to the subject of the litigation, they are thought to possess intrinsically high probative value.

The exceptions for excited utterance, present sense impression, and state of mind are based on a peculiar belief that contemporaneity, excitement, or a combination of the two lend an extra element of trustworthiness to the hearsay evidence.<sup>106</sup> Specifically, the excited utterance exception is based on a belief that a statement made under stress or excitement, at the very moment of the event, carries a high degree of trustworthiness.<sup>107</sup> In contrast, the exceptions for present sense impression and state of mind depend solely on the absence of sufficient time for the declarant to engage in reflective thought.<sup>108</sup>

### *B. Contemporaneity as Insurer Against Fabrication*

Federal Rule of Evidence 803(1) instructs that the hearsay rule does not exclude "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or

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*reactions to events leading to suit . . . .*" *Id.* at 389 n.64 (emphasis added); see also Park, *supra* note 28, at 75 (noting that the *res gestae* exceptions make more sense because they are connected to transactional statements).

104. See, e.g., *Skelly Beauty Academy, Inc. v. Columbia Gas* 58597-58600, 1991 Ohio App. LEXIS 4235, at \*13 (Ohio Ct. App. August 29, 1991) (finding reporter's testimony as to an unidentified firefighter's statements regarding the source of the fire admitted under the present sense impression exception).

105. Park, *supra* note 28, at 76.

106. See Mueller, *supra* note 20, at 371.

107. *Id.* (stating that excited utterances are admitted because "we think that people reacting suddenly to an event cannot lie").

108. See 11 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 803(1)[3] (2d ed. 1995).

condition, or immediately thereafter."<sup>109</sup> This exception for present sense impression generally involves an out-of-court statement describing an unexciting event.<sup>110</sup> The exception arises from the supposed reliability of a declarant's statement made contemporaneously with the event described.<sup>111</sup> Although the advisory committee note to 803(1) states that a "slight [time] lapse is allowable," the note makes it clear "that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation."<sup>112</sup> Contemporaneity is the key because "an impression made in response to any event is considered to be 'instinctive, rather than deliberative—in short, the reflex product of immediate sensual impressions, unaided by retrospective mental action.'"<sup>113</sup>

Likewise, the determination of Federal Rule of Evidence 803(3) that the hearsay rule does not exclude "[a] statement of the declarant's then existing state of mind, emotion, [or] sensation" finds its roots in the contemporaneity requirement.<sup>114</sup> In addition to the requirement that the statement be contemporaneous, thus insuring no chance for reflection before the statement is made, 803(3) requires that the state of mind of the declarant "be a relevant issue in the case."<sup>115</sup> This additional requirement would appear to be nothing more than a restatement of the already applicable relevance requirement found in Federal Rules of Evidence 401 and 402.

The contemporaneity justification for the present sense impression and state of mind exceptions centers on the belief that fabrication or misinterpretation is minimal when the declarant makes the statement with little or no time lapse between the underlying event and the statement.<sup>116</sup> This assumption is questionable at best, and

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109. See FED. R. EVID. 803(1).

110. See MCCORMICK, *supra* note 72, § 271, at 211; 11 MOORE ET AL., *supra* note 108, § 803(1)[3].

111. See MCCORMICK, *supra* note 72, § 271, at 211; 11 MOORE ET AL., *supra* note 108, § 803(1)[3].

112. FED. R. EVID. 803(1) advisory committee's note.

113. 11 MOORE ET AL., *supra* note 108, § 803(1)[1] (quoting Edmund M. Morgan, *Res Gestae*, 12 WASH. L. REV. 911 (1937)).

114. FED. R. EVID. 803(3); *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980) (holding that the court must evaluate three factors: contemporaneity, opportunity for reflection, and relevance).

115. *Prather v. Prather*, 650 F.2d 88, 90 (5th Cir. 1981).

116. MCCORMICK, *supra* note 72, § 271, at 211 (explaining that the exception for present sense impression finds its origin in Professor Thayer's work, and was a contradiction of Wigmore's insistence that excitement guaranteed reliability).

the fact that only the supposed trustworthiness, and, therefore, the reliability of such statements prevents their exclusion exposes a major flaw in the exception. According to Professor Tribe:

The closeness in time of statement to perception reduces memory problems to the de minimis level, and for a number of reasons, including the fact that what one perceives as his physical or mental sensations *are* his sensations, there is ordinarily no possibility of erroneous perception. But the . . . infirmities of ambiguity and insincerity remain.<sup>117</sup>

Despite the nexus between event and statement, there appears to be ample opportunity under the present sense impression exception for deliberate or accidental misstatement by the declarant. In *State v. Smith*<sup>118</sup> an assailant robbed the victim and locked him in the back of a truck.<sup>119</sup> After exiting the vehicle, the victim received a note from an unidentified woman who claimed she witnessed the robbery.<sup>120</sup> The note bore a license plate number that the police later used to apprehend the defendant.<sup>121</sup> Responding to defense objections that the note was inadmissible hearsay because it could have been inaccurate or deliberately contrived by the woman, the court affirmed the trial court's admission of the evidence under the present sense impression exception, stating:

The fact that the declaration is made contemporaneously with the event being described adds reliability in that there is no danger of a defective memory rendering the declaration unreliable. Also, in the case of verbal declarations, the declaration will be made in the hearing of the person who later relates the declaration. Therefore, this person will possibly have had an opportunity to observe the event himself, and thus provide a check on the accuracy of the declarant's observation. Even where the declaration is nonverbal, however, the fact that the statement is made contemporaneously with the act or immediately thereafter implies reliability since the declarant is unlikely to have had

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117. Tribe, *supra* note 22, at 965.

118. 285 So. 2d 240 (La. 1973).

119. *Id.* at 241-42.

120. *Id.* at 242.

121. *Id.*

an opportunity to form a purpose to mistake his observations.<sup>122</sup>

In contrast with his support of the excited utterance exception, Wigmore opposed the exception for present sense impression on the grounds that such exceptions possess no "circumstantial guarantee of sincerity (whether there was time to concoct a story, whether the excitement of the moment dominated), and the decision turns merely upon the question whether the declaration can be regarded as 'a part of the transaction,' or 'a part of the *res gestae*.'" <sup>123</sup>

Indeed, the only safeguard that exists to prevent such errors of admission into evidence is the length of time between the perceived event and the statement. According to McCormick, "[w]hile principle might seem to call for a limitation to exact contemporaneity, some allowance must be made for the time needed for translating observation into speech. Thus, the appropriate inquiry is whether sufficient time elapsed to have permitted reflective thought."<sup>124</sup> The arbitrariness that necessarily accompanies such an inquiry is evidenced in case law.<sup>125</sup> Is a time lapse of between fifteen and forty-five minutes too long to warrant admission of the statement under the exception? One litigant's guess would appear to be as good as another's.

Furthermore, as an initial justification for exceptions based solely on contemporaneity—the existence of corroborating testimony—was lost in the codification of the Federal Rules. The seminal case in the development of the exception for present sense impression was *Houston Oxygen Co. v. Davis*,<sup>126</sup> In *Houston* the driver of an automobile, occupied by two passengers, observed that the occupants of another car "must have been drunk" and that they were travelling at a high rate of speed.<sup>127</sup> Waltz has noted that besides the contemporaneous nature of the statement, an additional guarantor of trustworthiness existed in the corroboration by the passengers, who were present at the time and observed the event while hearing the

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122. *Id.* at 245. Alternatively, the court ruled that the note could have been an "excited utterance." *Id.* at 244-45.

123. 6 WIGMORE, *supra* note 3, § 1757(2), at 169.

124. MCCORMICK, *supra* note 72, § 271, at 214.

125. Compare *United States v. Blakey*, 607 F.2d 779, 786 (7th Cir. 1979) (holding as much as twenty-three minute lapse acceptable) *rev'd on other grounds*, *United States v. Harty*, 930 F.2d 1257, 1264 (7th Cir. 1991) with *Hilyer v. Howat Concrete Co.*, 578 F.2d 422, 426 n.7 (D.C. Cir. 1978) (holding a fifteen minute lapse was unacceptable).

126. 161 S.W.2d 474 (Tex. 1942).

127. *Id.* at 476.

statement.<sup>128</sup> McCormick supports Waltz's belief that corroboration of a present sense impression should be an additional requirement of any absolute exception to the hearsay rule:

[T]he limitation of the exception in terms of time and subject matter usually insures that the witness who reports the making of the statement will have himself perceived the event or at least observed circumstances strongly suggesting it. This . . . [is] an added assurance of accuracy, but a justification for admission is not the same as a requirement for admission.<sup>129</sup>

The advent of the 911 call and the subsequent technological dismantling of McCormick's belief in the automatic assurance of witness's corroboration convinced the New York Court of Appeals to recognize the present sense impression exception for the first time in that court's distinguished history and institute a corroboration requirement for all statements proffered under the exception.<sup>130</sup> In *People v. Brown*<sup>131</sup>, a caller identified only by a first name reported a restaurant burglary in progress, and gave a description and location of the alleged burglars.<sup>132</sup> Upon arrival at the scene, the police apprehended two suspects who matched the description given by the caller, and who, as the caller had described, were attempting to climb onto the roof of the restaurant.<sup>133</sup> According to the court, "[t]hat the circumstances and events at the scene were still very much as described by [the caller] corroborates what seems evident from the calls themselves—that [the caller's] reports were spontaneous and

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128. Waltz, *supra* note 81, at 24.

129. MCCORMICK, *supra* note 72, § 271, at 215. Even McCormick's assumption is refuted in an example given by Waltz, where the witness testified, "[w]hen I went into the living room my husband told me, 'Clyde Bushmat, whose voice I'd recognize anywhere, called me on the telephone just seconds ago and offered me a bribe.'" Waltz, *supra* note 81, at 24. Waltz notes that

[t]he witness on the stand did not hear either end of the supposed telephone conversation. Consequently, she provides no check on the accuracy of her husband's assertion that he had in fact received a telephone call. Likewise, she provides no check on the accuracy of her husband's assertion that the voice on the other end of the line was Clyde Bushmat's and that the words Bushmat spoke added up to a bribe offer.

*Id.*

130. *People v. Brown*, 610 N.E.2d 369, 373 (N.Y. 1993).

131. *Id.*

132. *Id.* at 371.

133. *Id.*

made contemporaneously with the events described."<sup>134</sup> The *Brown* decision is a step forward in hearsay law, for it recognizes the possibility of fabrication in the present sense impression exception and adds a measure of reliability not found in the Federal Rules or in state evidentiary rules that justify the exception solely on the basis of contemporaneity.

C. *Excitement as a Guarantor of Trustworthiness*

Under Federal Rule of Evidence 803(2), the hearsay rule does not exclude "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."<sup>135</sup> McCormick claims "the ultimate question is whether the statement was the result of reflective thought or whether it was rather a spontaneous reaction to the exciting event."<sup>136</sup> The exception for excited utterance may be traced directly to Wigmore's belief "that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief."<sup>137</sup> Wigmore insisted that "[t]he utterance . . . must be . . . 'generated by an excited feeling which extends without let or break-down from the moment of the event [it] illustrate[s].'"<sup>138</sup> Although Wigmore may have had good reason to fear unbridled judicial discretion, one may wonder why it is more desirable for judges to bury their heads in the sand and hide behind the questionable rationale of the excited utterance exception.

Indeed, judicial applications of the exception often appear to overlook the possibility that a traumatic event may not only still *reflective* thought, but may also hinder *rational* thought and cognitive functioning.<sup>139</sup> In *People v. Miklejohn*<sup>140</sup> a New York appellate court reversed the conviction of a murder suspect because the trial court failed to admit evidence of the excited utterance of the victim, who had been a long-time acquaintance of the defendant.<sup>141</sup> The

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134. *Id.* at 374.

135. FED. R. EVID. 803(2).

136. MCCORMICK, *supra* note 72, § 272, at 218.

137. 6 WIGMORE, *supra* note 3, § 1749.

138. *Id.* (citations omitted).

139. Mortimer J. Adler et al., *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 437 (1928).

140. 585 N.Y.S.2d 454 (App. Div. 1992).

141. *Id.* at 455-56.

defendant sought to introduce the victim's alleged statement, in which the victim told police that "he did not know the perpetrator and did not know if he could identify him."<sup>142</sup> The victim gave the statement only after questioning by the police and under the following conditions:

[T]he victim [was] lying face up on the sidewalk. There was a large puddle of blood around the head area. The victim was still conscious, *but appeared dazed and confused*, and was bleeding very heavily. He was suffering from what proved to be a fatal bullet wound to the head and brain.<sup>143</sup>

Despite the victim's severe head injury and apparent lack of cognitive faculties, the court ruled that the trial court erred in excluding the statement.<sup>144</sup> The court reasoned that "[i]n view of testimony indicating that the victim had been beaten and shot shortly before the police arrived, he was unlikely to have made the statements in question 'under the impetus of studied reflection.'"<sup>145</sup> Similarly, another decision of the New York Supreme Court demonstrates the judicial propensity to overlook the possible cognitive difficulties caused by severe trauma and focuses only on the "reflective thought" rationale behind the rule:

We find unpersuasive the defendant's challenge . . . regarding the complainant's identification of the defendant as her assailant shortly after the shooting. The testimony was properly admitted as an excited utterance, inasmuch as the record demonstrates that the complainant was under the stress of having suffered serious multiple gunshot wounds only minutes before making the statement, that she was bleeding heavily and was experiencing a great deal of pain, and that her statement was not the product of deliberation or reflection.<sup>146</sup>

Furthermore, the time lapse under excited utterance may be longer than that allowed under present sense impression and state of mind so long as the excitement of the event is deemed to have continued.<sup>147</sup> Again, in many of these cases, the possible cognitive

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142. *Id.* at 455.

143. *Id.* (emphasis added).

144. *Id.* at 455-56.

145. *Id.* at 456 (citations omitted).

146. *People v. Hood*, 598 N.Y.S.2d 569, 570 (App. Div. 1993).

147. *McCORMICK*, *supra* note 72, § 272, at 218-19.



deficiencies brought about by the trauma are not considered, nor are convincing reasons given to support the determination that the declarant has not begun to reflect on the traumatic event.<sup>148</sup> In *People v. Evans*<sup>149</sup> the New York Appellate Court admitted the victim's identification of the defendant as an "excited utterance."<sup>150</sup> According to the court, the "testimony . . . established that the victim was bleeding, breathing heavily, perspiring, weak, dizzy, and expressing a desire to go to the hospital" and

[a]lthough the victim's statement to the police officer was made approximately 30 minutes [after being shot in the stomach], the surrounding circumstances justify the conclusion that the statement was not made under the impetus of studied reflection and that the victim was still under the continuing stress and excitement of the shooting.<sup>151</sup>

As with the present sense impression and state of mind exceptions, judges inconsistently apply the excited utterance exception.<sup>152</sup> For instance, the court in *State v. Stafford*<sup>153</sup> admitted statements that the declarant had made some fourteen hours after the exciting event.<sup>154</sup> In *Alabama Power Co. v. Ray*,<sup>155</sup> however, an accident

148. See, e.g., *People v. Garcia*, 592 N.Y.S.2d 43, 43 (App. Div. 1993); *People v. Evans*, 583 N.Y.S.2d 510, 511 (App. Div. 1992).

149. 583 N.Y.S.2d 510.

150. *Evans*, 583 N.Y.S.2d at 511.

151. *Id.*; see also *Garcia*, 592 N.Y.S.2d at 43 (the victim made the statement at the hospital while he was in pain and feared dying).

We reject defendant's contention that [the victim's] statement to his mother at the hospital identifying defendant as the assailant was improperly admitted as an excited utterance, several witnesses having testified to [the victim's] expression of pain and fear of dying, and the circumstances otherwise "reasonably justify[ing] the conclusion that the remarks were not made under the impetus of studied reflection." A different result is not required simply because the utterance was made some 45 minutes after the knife attack in response to a question put to [the victim] by his mother.

*Garcia*, 592 N.Y.S.2d at 43-44 (citation omitted) (third alteration in original).

Lempert and Saltzburg note that "there are cases where time is, in effect, suspended. Courts have admitted statements made by individuals immediately upon waking from comas, hours or even days after the event described, apparently on the theory that while the patient was unconscious the excitement did not abate." LEMPERT & SALTZBURG, *supra* note 30, at 418.

152. *State v. Stafford*, 23 N.W.2d 832, 835 (Iowa 1946); *Alabama Power Co. v. Ray*, 32 So. 2d 219, 221 (Ala. 1947); *Handel v. New York Rapid Transit Corp.*, 297 N.Y.S. 216, 216 (App. Div. 1937).

153. 23 N.W.2d 832 (Iowa 1946).

154. *Id.* at 835-36.

155. 32 So. 2d 219 (Ala. 1947).

victim's statement, made just five minutes after the incident, was deemed inadmissible.<sup>156</sup> And in the well-known case of *Handel v. New York Rapid Transit Corp.*, over a strong dissent based on res gestae principles, the Supreme Court of New York refused to allow testimony recounting the screams of the victim, "Save me. Help me—why did that conductor close the door on me."<sup>157</sup> According to the court, the statement "was narrative of a past event and within the hearsay rule."<sup>158</sup>

The most startling example of an arbitrary application of the exception may be *People v. Seymour*,<sup>159</sup> in which the Supreme Court of New York determined that the statements of the seventy-nine-year-old victim, identifying the defendant, were partially admissible and partially inadmissible under the exception for "excited utterance."<sup>160</sup> In *Seymour* the wounded victim lay in his apartment for forty-eight hours following the attack, drifting in and out of consciousness, and made his first utterance an hour and twenty minutes after being discovered in his apartment.<sup>161</sup> The court admitted this first statement, noting that because of "the substantial distractions which accompanied the administration of medical care . . . decedent could not have concentrated sufficiently to fabricate an accusation."<sup>162</sup> The court also reasoned that the physical trauma insured that the victim "had not yet had an opportunity for 'studied reflection.'"<sup>163</sup> However, the court refused to admit the victim's additional statements made twenty minutes after further emergency treatment, in which the victim identified the defendant by name.<sup>164</sup> The court determined that the second utterance, unlike the first, was not a "spontaneous declaration."<sup>165</sup> *Seymour* demonstrates how the excited utterance exception fosters a propensity for judicial mind reading. Perhaps equally disturbing is a decision of the Supreme Court of Pennsylvania which appears to remove excited utterances from the realm of human creation:

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156. *Id.* at 221.

157. 297 N.Y.S. at 217.

158. *Id.*

159. 588 N.Y.S.2d 551 (App. Div. 1992).

160. *Id.* at 553-54.

161. *Id.* at 552.

162. *Id.* at 555.

163. *Id.* at 554.

164. *Id.* at 554-55.

165. *Id.* at 554.

An excited utterance is the event speaking and not the speaker. It is an exception to the hearsay rule, carved from human experience, which teaches that an unreflected [sic], spontaneous utterance made under the impact of a shocking, unexpected emotion, precipitated by a traumatic event, renders the speaker the medium and not the message.<sup>166</sup>

These cases demonstrate that the vast differences in judicial application of the exception leave litigants guessing as to what potentially decisive testimony will be admitted and excluded at trial.

Wigmore apparently ignored or overlooked the glaring danger that excitement, impulse, fear, or similar exigencies may lead to *misstatement* by the declarant. Commentators, however, have not been so lax in their evaluation of the exception. Indeed, it is virtually impossible to find a modern commentator who accepts Wigmore's assumptions regarding the effect of highly exciting events on a declarant. Although Lempert and Saltzburg agree with Wigmore's belief that excitement may prevent self-serving statements, they argue, "excitement tends to distort perception and may cloud memory. There is reason to believe that excited utterances are, on balance, less reliable than much of the hearsay we refuse to admit."<sup>167</sup> This may be especially true when the declarant observes a startling, unfamiliar event.<sup>168</sup> Park states that "[t]he excited utterance exception . . . can hardly be defended [on the ground of declarant reliability]—indeed, the better view seems to be that excited utterances are *less* reliable than unexcited ones."<sup>169</sup> Mueller asks rhetorically, "Who would tell a daughter to sort out second-hand statements by applying the tests embedded in the hearsay exceptions—'trust what you're told an excited man said,' for example, because 'excited men don't lie'?"<sup>170</sup> And according to Professors Hutchins and Slesinger:

166. *Commonwealth v. Zukauskas*, 462 A.2d 236, 237 (Pa. 1983).

167. LEMPERT & SALTZBURG, *supra* note 30, at 417.

168. I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 28.

169. Park, *supra* note 28, at 75. Park goes on to suggest that the transactional nature of *res gestae* statements work somewhat like relation back of amendments, in that the opponent is not surprised by the easily discoverable hearsay statement. *Id.* While one could question Park's assumption, it is even more curious that he believes that this feature makes the *res gestae* exceptions "easy to accept even if they lack indicia of reliability." *Id.* Why, one might ask, would we, under any circumstances, want unreliable evidence presented to the trier of fact?

170. Mueller, *supra* note 20, at 375.

What the emotion gains by way of overcoming the desire to lie, it loses by impairing the declarant's power of observation. On the one hand, if reflective self-interest has not had a chance to operate because of emotional stress, then the statement should be excluded because of the probable inaccuracy of observation. On the other, if little emotion is involved, clearly a very short time is sufficient to allow reflective self-interest to assume fullsway. On that basis there would seem to be no reason for this hearsay exception. In fact, the emphasis should be all the other way. On psychological grounds, the rule might very well read: Hearsay is inadmissible, especially (not except) if it be a spontaneous exclamation.<sup>171</sup>

Empirical evidence, as well as common sense, support these suspicions of Wigmore's premise. For instance, according to a recent psychological study exploring the ways in which cognitive faculties are affected by various stress-producing situations,

[r]esearch evidence suggests that a deterioration in the quality of the decision-making process is observed during stress. Experimentally manipulated stressors such as perceived threat, time pressure, and noise, as well as more naturally occurring life-event stressors are associated with a low quality decision-making process. These changes include decreased ability to differentiate and integrate information in the decision-making process [and] greater emphasis on negative evidence.<sup>172</sup>

Similarly, another group of researchers studying the way in which humans process information, determined that as the "input load" of information is increased, "we witness a decline in perception and an increase or maintenance in decision-making structure."<sup>173</sup> In a highly stressful situation, the ability to make quick, efficient decisions

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171. Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 439 (1928). Curiously, Hutchins and Slesinger conclude that *both* the exception for "excited utterance" and present sense impression should be retained. *Id.*

172. Yavin Shaham et al., *Stability/Instability of Cognitive Strategies Across Tasks Determine Whether Stress Will Affect Judgmental Processes*, 22 J. APP. SOC. PSYCHOL. 691, 694 (1992) (citations omitted).

173. HAROLD M. SCHRODER ET AL., HUMAN INFORMATION PROCESSING: INDIVIDUALS AND GROUPS FUNCTIONING IN COMPLEX SOCIAL SITUATIONS 99 (1967).

may be dependent on "more and more restricted perception."<sup>174</sup> Another study indicates that exposure to traumatic events may foster selective memory and encourage the victim to find any reasonable explanation for the trauma.

Traumatic stressors appear to evoke certain cognitive mechanisms . . . . In the process, new and unfamiliar information is excluded. Alternatively, one might say that the past is seen in the present and the unique and new aspects of the present are not responded to. Additionally, there appears to be a loss of flexibility of cognition and perception. . . .

. . . It does appear that in the absence of meaning or when the "facts do not fit," individuals and groups attempt to develop a meaning for the events that are occurring.<sup>175</sup>

An article by Daniel Stewart gives a thorough account of much of the psychological data that refutes historical assumptions about the guarantors of accuracy and perception.<sup>176</sup> In addition to the problems of witness's "stereotypes"<sup>177</sup> and poor recollection of "verbal descriptions,"<sup>178</sup> Stewart notes:

[n]umerous other factors influence perception and memory. The mental "set" or expectation of an individual will tend to focus attention on particular objects to the exclusion of others. Favorable material is more readily remembered than unfavorable. Excitement, a factor evidence law relied upon as a warrant for trustworthiness, produces a significant degree of error, sometimes of the most bizarre type. Repression of memories of acts or thoughts strongly inconsistent with a person's self-concept may transpose reality diametrically . . . .<sup>179</sup>

Indeed, stressful events are responsible for problems of perception, cognition, and performance at a variety of levels and in virtually every situation—from a decline in major league batting averages in pressure situations,<sup>180</sup> to the ability of police officers to perform

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174. *Id.*

175. Robert J. Ursano & Carol S. Fullerton, *Cognitive and Behavioral Responses to Trauma*, 20 J. APP. SOC. PSYCHOL. 1766, 1772 (1990).

176. Stewart, *supra* note 168, at 19-29.

177. *Id.* at 17.

178. *Id.* at 19.

179. *Id.* (citations omitted).

180. Mark H. Davis & Jonathan C. Harvey, *Declines in Major League Batting Performance as a Function of Game Pressure: A Drive Theory Analysis*, 22 J. APP. SOC.

adequately in high-stress training,<sup>181</sup> to the way in which students cope with exam pressure.<sup>182</sup> Scanning the wealth of information describing how stressful, traumatic events negatively affect human functioning, it is disturbing to discover that judges regularly rely upon the excited utterance exception for no better reason than its "firm entrenchment" in the law of evidence.<sup>183</sup>

Curiously, Wigmore's belief in the reliability of "excited utterances" led to its inclusion in the class of exceptions which are admissible despite the declarant's availability to testify at trial.<sup>184</sup> In other words, to accept Wigmore's position, one must be convinced that the declarant's excited statement is more trustworthy than her live recollection of the event at trial.<sup>185</sup> Professor Tribe emphasizes:

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PSYCHOL. 714 (1992).

181. John M. Violanti, *Coping Strategies Among Police Recruits in a High-Stress Training Environment*, 132 J. SOC. PSYCHOL. 717 (1992).

182. Robert F. Scherer & Philip M. Drumheller, Jr., *Consistency in Cognitive Appraisal of a Stressful Event Over Time*, 132 J. SOC. PSYCHOL. 553 (1992). Scherer and Drumheller found that "the process of evaluating a stressful event may change over the duration of the event." *Id.* at 554 (citation omitted). This finding appears to especially challenge the judicial application of the "excited utterance" exception when even a shorter amount of time has passed between the exciting event and the utterance.

183. See, e.g., *United States v. Moore*, 791 F.2d 566 (7th Cir. 1986); *Price v. Indiana*, 591 N.E.2d 1027 (Ind. 1992); *Holmes v. State*, 480 N.E.2d 916 (Ind. 1985); *Chapman v. Maryland*, 628 A.2d 676 (Md. 1993).

The ease with which courts accept the excited utterance exception is especially disturbing in the context of the Sixth Amendment Confrontation Clause where the Supreme Court recently stated that "[o]ur precedents have recognized that statements admitted under a 'firmly rooted' hearsay exception are so trustworthy that adversarial testing would add little to their reliability." *Idaho v. Wright*, 497 U.S. 805, 820-21 (1990). In the same opinion the Court confirmed that the exception for excited utterances is "firmly rooted":

[I]f the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial. The basis for the "excited utterance" exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous.

*Id.* at 820.

184. The exceptions to the hearsay rule are officially grouped into two classifications: those exceptions where the declarant is unavailable and those where the declarant's unavailability is immaterial. See, e.g., FED. R. EVID. 803 (unavailability immaterial); FED. R. EVID. 804 (declarant unavailable).

185. In addition to its unquestioning reliance on the historical rationale behind the "excited utterance" exception, the *Wright* Court stressed the unimportance of cross-examination when a court admits such hearsay. *Wright*, 497 U.S. at 821. The Court's assertion that the "excited utterance" exception renders cross-examination "of marginal

[T]he absence of an unavailability requirement for excited utterances is based on the view that an excited utterance about an event is likely to be more "reliable" than in-court testimony about the same event. But [Tribe's theory] suggests that this explanation does not suffice, for an excited utterance might suffer from severe infirmities of ambiguity which cross-examination could usefully reduce.<sup>186</sup>

Thus, a proponent's ability to proffer such hearsay evidence when the declarant could otherwise testify is especially devastating when coupled with the opponent's inability to cross-examine the declarant.

utility" or "superfluous" provided rather enigmatic support for the exception's continued inclusion in the "unavailability immaterial" category. *Id.* at 820. Because, however, the defendant in *Wright* conceded that the declarant was unavailable, the Court did not explicitly decide whether its rule announced in *Ohio v. Roberts*, 448 U.S. 56 (1980), that the Confrontation Clause required that a declarant be available to testify at trial or be clearly unavailable before reliable hearsay could constitutionally be admitted, would be relaxed in the case of a "firmly rooted" exception. *Wright*, 497 U.S. at 820-21; see *United States v. Inadi*, 475 U.S. 387 (1986) (holding that *Roberts'* unavailability requirement was not applicable to co-conspirator statements).

Thus, some commentators continued to question whether adherence to the "firmly rooted" excited utterance exception would pass constitutional muster in a case where the declarant was available, yet the prosecution did not produce the declarant at trial. See, e.g., Daniel J. Capra, *Child-Witness Statements and the Right to Confrontation*, N.Y. L.J., July 13, 1990, at 3. "After *Wright*, a strong argument can be made that the prosecution must produce all available hearsay declarants—other than co-conspirators, who are specifically controlled by *Inadi*—unless cross-examination would be of little utility to the defendant in the specific case." *Id.* at 33. All speculation was put to rest by the Court's decision in *White v. Illinois*, 502 U.S. 346 (1992), which resoundingly approved the exception for excited utterances.

[T]he evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations . . . is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness. But those same factors that contribute to the statements' reliability cannot be recaptured even by later in-court testimony. A statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom . . . .  
 . . . [W]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.

*Id.* at 355-56 (footnote omitted). Implicitly, the Court's holding applies to all other "firmly rooted" exceptions. In a footnote, the Court made clear that its definition of "firmly rooted" hinges on the exception's historical place in the hearsay schema and its continued widespread use and acceptance—not on the defensibility of the exception's theoretical underpinnings. *Id.* at 355 n.8. Under this definition, the lengthy tenure and almost universal acceptance of the exceptions for present sense impression and state of mind would make them likely candidates for inclusion in the "firmly rooted" category. See *Bourjaily v. United States*, 483 U.S. 171, 183 (1987).

186. Tribe, *supra* note 22, at 969.

The assertion that the hearsay exceptions provide only a *baseline* level of reliability in the absence of cross-examination<sup>187</sup> may appear to support the transfer of the res gestae exceptions into the "declarant unavailable" category.<sup>188</sup> Although this strategy might rectify the immediate inequity, the infirmities that permeate the exceptions would remain when a party seeks to admit the res gestae statements of an unavailable or deceased declarant.<sup>189</sup> To emphasize this point, recall that courts admit res gestae statements even when the defendant is available because the statements supposedly possess an extra measure of reliability and probative force that cannot be duplicated by the declarant's direct testimony.<sup>190</sup> Therefore, to move the res gestae exceptions into the "declarant unavailable" category would effectively concede the weaknesses of the theoretical underpinnings of the exceptions and would place the law in the untenable position of sanctioning the occasional admission of unreliable evidence.

It appears the Advisory Committee to the Federal Rules of Evidence did not disregard numerous empirical data and common-sense objections to the excited utterance exception.<sup>191</sup> Instead of heeding the warnings, however, the committee chose to incorporate Wigmore's largely unsubstantiated exception by making an interesting deduction.<sup>192</sup> To paraphrase the committee: if so many courts have followed the rule, it must be good.<sup>193</sup> It is quite disturbing that the committee's questionable justification, already based on Wigmore's questionable rationale, anchors a body of law that dictates what evidence is admitted in our federal courts, and, by inference, in many state courts.

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187. See *supra* part II.C.1.

188. It should be noted that arguing for the shift of the res gestae exceptions into the "declarant unavailable" category does not necessarily implicate an argument for abolition of the entire "unavailability immaterial" category. Hearsay based on written records, for instance, may be truly more probative than the live testimony of the recording party.

189. Stewart argues that "[w]henver hearsay testimony raises substantial questions of the accuracy of perception and memory of the hearsay declarant, the law should require the declarant to testify and should admit his hearsay declarations only if he is unavailable." Stewart, *supra* note 168, at 3.

190. See *White*, 502 U.S. at 356.

191. FED. R. EVID. 803(2) advisory committee's note.

192. *Id.*

193. The actual explanation of the advisory committee was that "[w]hile the theory of [the excited utterance exception] has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, . . . it finds support in cases without number." See Park, *supra* note 28, at 75 n.98 (quoting FED. R. EVID. 803(2) advisory committee's notes).



As one commentator noted during the debate over the Federal Rules, the *res gestae* exceptions contain virtually no effective safeguards against fabrication; they fail to differentiate between interested and disinterested witnesses; they are ineffective even when accompanied by cross-examination of the witness because the witness need only "state what he remembers or 'thinks' the declarant said" and there is no corroboration requirement.<sup>194</sup> The fallacy of "reflective thought" as an objective measurement and the judicial inability to consistently apply doctrines based on such questionable theoretical foundations make abolition of the exceptions for excited utterance, present sense impression, and state of mind a logical step in refining an otherwise efficacious evidence system.

#### V. VIABLE RES GESTAE HEARSAY: ARE THERE ALTERNATIVES FOR ADMISSION?

##### A. *Probative Value Versus Questionable Reliability*

One might argue that abolishing the *res gestae* exceptions carries the risk that information will be withheld from the jury—information that, if reliable, could be extremely probative in the search for truth. The test essentially balances the risk of an unjust verdict based on unreliable hearsay against the possibility that the proffered evidence is reliable and probative. The questionable theoretical justifications that suggest the veracity of statements made under stress, excitement, or during the course of a transaction—not to mention the possibility of outright fabrication by the witness—and the suspect accuracy that results, must always outweigh the danger that probative information will be excluded.

If the excluded statement would recount evidence that is available from other sources, then the proponent of the evidence must ensure that such *reliable* sources or witnesses are brought before the trier of fact for consideration. Absent this corroborating evidence, the exclusion of the *res gestae* hearsay is all the more warranted. If no other sources are available, and if the sound hurdles provided by one of the other exceptions cannot establish the reliability of the proffered hearsay, the probative value of the evidence should be disregarded and the evidence excluded. In other words, evidence based solely on the *res gestae* exceptions should *never* be admitted. In light of this

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194. Note, *Rule 804(b)(2) of the Proposed Federal Rules of Evidence: A Step Too Far?*, 4 VAL. U. L. REV. 327, 342 (1970).

determination, is there a place for the admission of res gestae hearsay in the courtroom?

*B. The "Catch-All" Exceptions: A Possible Avenue of Admission*

Abolishing the res gestae exceptions does not absolutely foreclose the possibility that such hearsay will be admitted. The Federal Rules of Evidence contain provisions allowing admission of otherwise inadmissible hearsay when certain guarantors of reliability are present.<sup>195</sup> Such statements are "not specifically covered by any of the foregoing exceptions but hav[e] equivalent circumstantial guarantees of trustworthiness."<sup>196</sup>

These residual exceptions, codified in Rule 803(24), declarant unavailability immaterial; and Rule 804(b)(5), unavailability required; are specifically designed for situations where proffered evidence "demonstrate[s] a trustworthiness within the spirit of the specifically stated exceptions."<sup>197</sup> As enacted, they would provide judges with the limited discretion necessary to admit res gestae hearsay only when it overcomes the infirmities discussed in preceding sections of this Article.

The residual exceptions admonish judges to act with care when admitting evidence thereunder.<sup>198</sup> The Advisory Committee stated that these exceptions "do not contemplate an unfettered exercise of judicial discretion."<sup>199</sup> This is an admonition that judges are well-advised to follow in the case of res gestae statements. Significantly, the current codified exceptions for excited utterance, present sense impression, and state of mind contain no such suggestion of judicial restraint, and some judges have been quick to admit testimony under their questionable auspices.<sup>200</sup>

In addition, both residual exceptions require that the proffered statement be a "material fact."<sup>201</sup> As Lempert and Saltzburg note, this requirement has little substantive effect, because "[i]f a statement

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195. *Id.* at 332-33.

196. FED. R. EVID. 803(24) & 804(b)(5).

197. FED. R. EVID. 803(24) advisory committee's note.

198. LEMPERT & SALZBURG, *supra* note 30, at 502 (citing SENATE COMM. ON THE JUDICIARY, REPORT ON THE FEDERAL RULES OF EVIDENCE, S. REP. NO. 1277, 93d Cong., 2d Sess. 20 (1974)).

199. FED. R. EVID. 803(24) advisory committee's note.

200. *See generally supra* part III (discussing the problems presented by broad judicial discretion).

201. FED. R. EVID. 803(24)(A) & 804(b)(5)(A).

is not material, it is not admissible under any hearsay exception."<sup>202</sup> But as a check on the system, the requirement should help to underscore the judge's duty to use extreme caution in evaluating the viability of such evidence. Likewise, the requirement "that the purposes of the rules and the interests of justice be served" simply underscores the cautionary function.<sup>203</sup> The residual exceptions also contain a notice provision, not found in the *res gestae* exceptions.<sup>204</sup> This requirement ensures that an opponent is not caught off-guard by the admission of what would usually be inadmissible hearsay.<sup>205</sup> This additional requirement would be an improvement over current *res gestae* admission practices, in which, as shown, judges often apply the exceptions arbitrarily, giving the litigants little notice of what will be admitted and excluded.

The final safeguard employed by the residual exceptions also directly addresses a problem associated with the *res gestae* exceptions. Under both Rule 803(24) and Rule 804(b)(5), the proffered statement must be "more probative on the point for which it is offered than any other evidence which the proponent can secure through reasonable efforts."<sup>206</sup> Although Rule 803(24) technically falls within the unavailability immaterial category, an available declarant with testimony more probative than the proffered hearsay must testify or the evidence will never come before the fact-finder; a declarant's valuable testimony cannot be withheld while less probative hearsay is admitted under the residual exception.<sup>207</sup> Therefore, unlike *res gestae* statements, which are included in the unavailability immaterial category and are often admitted despite the existence of better live testimony, Rule 803(24) refuses to allow a party to proffer questionable hearsay while a declarant with superior direct testimony waits in the wings.<sup>208</sup> Similarly, when the declarant is unavailable, Rule

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202. LEMPERT & SALTZBURG, *supra* note 30, at 503.

203. *Id.*

204. FED. R. EVID. 803(24) & 804(b)(5).

205. *Id.*

206. *Id.*

207. See *United States v. Inadi*, 475 U.S. 387, 394 (1986); FED. R. EVID. 803(24)(B).

208. *Inadi*, 475 U.S. at 394; FED. R. EVID. 803(24)(B). As discussed previously, *supra* notes 182 and 184, the Confrontation Clause figures prominently in the admission of hearsay in criminal prosecutions. Under current Supreme Court jurisprudence, the *res gestae* exceptions appear to be "firmly-rooted exceptions," and are thus admissible, regardless of the declarant's availability, because of the supposed inherent trustworthiness that permeates an exception cloaked with the "firmly-rooted" designation. *Idaho v. Wright*, 497 U.S. 805, 821 (1990).

804(b)(5) demands that the proffered utterances, excited or otherwise, of the out-of-court declarant be better than any other evidence offered on the point. This, of course, is a requirement not found in the current res gestae scheme, where the hearsay is admitted regardless of the existence of more probative evidence so long as the

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Two observations bear mention. First, the exclusion of res gestae statements from the "firmly-rooted" exception category would follow, *per se*, the abolition of res gestae statements as categorical exceptions to the hearsay rule—after all, they would no longer be exceptions. Yet, this removal from the "firmly-rooted" category would have nothing to do with the theoretical dismantling of the res gestae exceptions that precipitated their abolition because the Court defines an exception as "firmly-rooted," not because it makes theoretical sense, but because it enjoys longevity and is widely accepted by the courts; a viable theoretical underpinning has little or nothing to do with the designation. See *Bourjaily v. United States*, 483 U.S. at 183; *supra* notes 182 and 184 and accompanying text. Thus, if offered under one of the residual exceptions, a res gestae statement would have to overcome the same Confrontation Clause hurdles as any other rootless or poorly-rooted exception. In other words, after abolition of the res gestae exceptions, a court could not simply use a boot strap argument to circumvent the Confrontation Clause and admit an excited utterance under a residual exception because it was theoretically "firmly-rooted."

Second, if the res gestae exceptions are abolished and such statements are admissible only under one of the residual exceptions, it remains to be seen whether the declarant must either be unavailable or stand ready to testify at trial. This assumes, of course, that the proffered statement "is supported by 'a showing of particularized guarantees of trustworthiness,'" *Wright*, 497 U.S. at 816 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). Although the Court has not explicitly answered this question, its decisions in *Wright* and *White v. Illinois* suggest that an unavailability rule will not be imposed on the admission of all hearsay proffered in criminal trials under Rule 803(24). *Wright*, 497 U.S. at 815, 826-27; *White*, 502 U.S. at 354-56.

In *Wright* the Court refused to admit the statements of a declarant proffered under Idaho's residual exception, essentially the same as the federal residuals. 497 U.S. at 812, 826-27. The Court, however, did not address the existence of an unavailability rule, because the defendant did not argue that the declarant was available to testify. *Id.* at 816. Instead, the Court determined that the statements, despite corroboration, were not trustworthy. *Id.* at 826-27.

In *White* the Court held that an excited utterance was "firmly rooted," and therefore, that the declarant's unavailability was immaterial. 502 U.S. at 353-57. In so doing, the Court expressly rejected an unavailability test, narrowly construing *Ohio v. Roberts* as "stand[ing] for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." *Id.* at 354. The Court found that the "substantial probative value" and "evidentiary value" of the testimony, coupled with the indices of reliability inherent in an excited utterance, satisfied the constitutional standard. *Id.* at 356. Thus, it appears that hearsay proffered under Rule 803(24) in a criminal trial must meet two requirements: (1) the testimony must have "independent evidentiary significance" that cannot be duplicated by the declarant on the witness stand; and (2) the testimony must provide particular guarantees of reliability and trustworthiness. See *Inadi*, 475 U.S. at 394; *Roberts*, 448 U.S. at 65-66. One can envision circumstances where a res gestae statement, proffered under Rule 803(24) would meet these requirements.

proffered statement carries some indicium of "reliability" such as contemporaneity or spontaneity.

If the *res gestae* exceptions are abolished, a judge operating under the catch-all exceptions will be encouraged, indeed required, to exclude the proffered hearsay and see that an available declarant takes the stand. Furthermore, in those cases where the declarant is unavailable, it is likely that corroborating testimony that is more reliable and at least as probative as the proffered hearsay will be "discovered" once it appears that the judge is determined to exclude the hearsay. Such testimony can then be admitted in lieu of the remote statement, and the remote statement can be excluded because of its cumulative nature.

## VI. CONCLUSION

As a reliability screening device, the hearsay rule is fundamentally sound. It protects against the errant or fabricated statements of remote declarants and in-court witnesses, and it helps to ensure that the jury does not base its decision on untested hearsay. Because the declarant is not subject to cross-examination, there must be additional guarantors of trustworthiness to take its place before hearsay should be admitted.

These procedural guarantors are found in the exceptions to the basic exclusionary principle of the hearsay rule. Each exclusion is based on some circumstantial factor which ensures that the evidence is reliable, or that points to a high level of necessity. Although most of the exceptions are rooted in accepted indicators of reliability, the *res gestae* exceptions miss the mark.

The *res gestae* exceptions derive from the fallacy that the mental effect of contemporaneity or excitement on a declarant is an immediate heightening of perception and accurate recall, and an abatement of the propensity to fabricate or misperceive an event. Modern scholars have almost universally attacked these beliefs and the continued admission of *res gestae* hearsay casts doubt on judgments which appear to rely heavily on such statements.

Abolition of the *res gestae* exception, however, need not lead to the categorical exclusion of all hearsay which would otherwise come under its auspices. The residual exceptions to the hearsay rule provide an established and acceptable means by which judges, acting with appropriate discretion, may occasionally admit *res gestae* statements which provide particular guarantees of reliability.